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Nos. 80-651 and 80-639

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-651

RONALD FUSCO,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

No. 80-639

BERNARD SULLIVAN,

Petitioner,

v.

PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT AND INDEMNITY CO.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

(Cover continued on reverse side.)

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QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari filed by Ronald Fusco was timely within the meaning of Section 2101 (c) of Title 28, United States Code and Rule 20 of the Rules of this Court.

2. Whether a worker engaged in the construction of a cement substructure, upon which a sewage treatment plant would ultimately be erected, is a "maritime employee" within the meaning of Sec. 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U. S. C. Sec. 901 et seq. (1970 & Supp.V 1975).

TABLE OF CONTENTS

Questions Presented i

Jurisdiction 1

Statutory Provision Involved 2

Reasons for Denying The Writs 3

I. The Petition For a Writ of Certiorari Filed by Ronald Fusco Was Not Timely Within The Meaning of Section 2101(c) of Title 28, United States Code, And is Therefore Jurisdictionally Defective, And Should be Denied. 3

II. The Decision Below is Consistent With The Interpretation of Section 2(3) of the Longshoremen's And Harbor Workers' Compensation Act, Mandated by This Court in P. C. Pfeiffer Co. v. Ford. 11

III. The Decision Below is Consistent With the Decisions of the Circuit Courts Which Have Considered the Issue of "Maritime Employment" Under Section 2(3) of The Act. 25

IV The Court Below Analyzed the Work Activities of Petitioners in Accordance With the Mandate of This Court and Correctly Concluded That Their Activities do not Bear a Significant Relationship to Navigation or to Commerce on Navigable Waters. 31

Conclusion 37

TABLE OF APPENDICES

APPENDIX A

Order of the United States Court of Appeals for the Second Circuit granting the motion to consolidate the appeals of Ronald Fusco, Bernard Sullivan and the Director, Office of Workers' Compensation Programs, Department of Labor A-1

TABLE OF AUTHORITIES

CASES: Page

Brown and Root, Inc. v. Joyner, 607 F.2d 1087 (4th Cir. 1979), cert. denied, ___U.S.___, 100 S.Ct. 2960 (1980)..... 28,29

Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962)..... 22

Cole v. Schenley Industries, Inc., 563 F.2d 35 (2d Cir. 1977)..... 8,9

Conti v. Norfolk & W. Ry., 566 F.2d 890 (4th Cir. 1977)..... 26

Deal v. Cincinnati Board of Education, 402 U.S. 962 (1970)..... 4

Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942)..... 3,4

Fusco v. Perini North River Associates, 601 F.2d 659 (2d Cir. 1979), vacated and remanded, 444 U.S. 1028 (1980).... 11,15

Fusco v. Perini North River Associates, 622 F.2d 1111 (2d Cir. 1980)..... 4,12,25 28,34,36

Greenberg v. Giannini, 140 F.2d 550 (2d Cir. 1944)..... 9

I.T.O. Corp. of Baltimore v. Benefits Review Board, 529 F.2d 1080 (4th Cir. 1975), modified en banc on other grounds, 542 F.2d 903 (4th Cir. 1976), vacated and remanded sub nom., Adkins v. I.T.O. Corp. of Baltimore, 433 U.S. 904 (1977), rev'd on remand, 563 F.2d 646 (4th Cir. 1977)... 26

Johnson v. Manhattan Railroad Co., 289 U.S. 472 (1933)..... 8,9

Massman Constr. Co. v. Bassett, 30 F.Supp. 813 (E.D.Miss. 1940), rev'd on other grounds, 120 F.2d 230 (8th Cir. 1941), cert. denied, 314 U.S. 648 (1941)..... 35

Matton Steamboat Co. v. Murphy, 319 U.S. 412 (1943)..... 3

Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969)..... 16

Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977)..... 20,24

Odom Constr. Co., Inc. v. U.S. Dept. of Labor, 622 F.2d 110 (5th Cir. 1980)..... 26,27,28

P.C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979)..... passim

Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952)..... 22,23

Perini North River Associates v. Fusco, 444 U.S. 1028 (1980)..... 11

Sea-Land Services v. Director, Office of Workers' Compensation, 540 F.2d 629 (3rd Cir. 1976)..... 26

Sedmak v. Perini North River Associates, BRB Nos. 77-896, 77-579, 77-579A, 78-129, 78-407 (November 30, 1978), reported in 9 BRBS 378 (1978)..... 7

Stockman v. John T. Clark and Son of Boston, 539 F.2d 264 (1st Cir. 1976), cert. denied, 433 U.S. 908 (1977)..... 25

Thibodaux v. Atlantic Richfield Co., 580 F.2d 841 (5th Cir. 1978), cert. denied, 442 U.S. 909 (1979)..... 26

United States v. Johnston, 268 U.S. 220 (1925)..... 30

Weyerhauser Co. v. Gilmore, 528 F.2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976)..... 21,26 28

MISCELLANEOUS:

Larson, Workmen's Compensation Law Sec. 89.27 at 16-181 (1980)..... 21n

Moore, Federal Practice Par.42.02 at 42-22 (2nd ed. 1980)..... 8

STATUTES:

Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. Sec.901 et seq. (1970 & Supp. V 1975)..... passim

28 U.S.C. Sec.1254 (1)..... 1

28 U.S.C. Sec.2101(c)..... i,2,3, 4,10

COURT RULES:

Supreme Court Rule 20..... i,4,6, 10

IN THE

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October Term, 1980

No. 80-651

RONALD FUSCO,

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PERINI NORTH RIVER ASSOCIATES and
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BERNARD SULLIVAN,

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On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Perini North River Associates and Hartford Accident and Indemnity Company, respectfully request that this Court deny the petitions for writ of certiorari, seeking review of the Second Circuit's opinion in this case. That opinion is reported at 622 F.2d 1111.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on June 4, 1980. On August 19, 1980, the Second Circuit denied Petitioner Sullivan's timely Petition for Rehearing and Rehearing En Banc. Petitioner Fusco did not seek a rehearing before the court below. Sullivan filed the instant Petition for Certiorari on October 20, 1980. Fusco filed his Petition for Certiorari on October 17, 1980.

Both petitioners invoke the jurisdiction of this Court under 28 U. S. C. Sec. 1254 (1). Respondents argue in Point I, infra at 3-10 , that Fusco's petition was not filed within the time limitations prescribed in 28 U. S. C.

Sec. 2101 (c), and is therefore jurisdictionally defective.

STATUTORY PROVISIONS INVOLVED

Section 902(3) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. Sec. 902(3) (1970 ed. & Supp. V) is set forth as Appendix I, at A-103, of Fusco's petition.

Title 28, U.S.C. Sec. 2101 (c) states:

> Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

28 U.S.C. Sec. 2101 (c) (1976).

REASONS FOR DENYING THE WRITS

POINT I

THE PETITION FOR A WRIT OF CERTIORARI FILED BY RONALD FUSCO WAS NOT TIMELY WITHIN THE MEANING OF SECTION 2101(c) OF TITLE 28, UNITED STATES CODE, AND IS THEREFORE JURISDICTIONALLY DEFECTIVE, AND SHOULD BE DENIED.

Section 2101(c) of Title 28, United States Code, provides that in a civil case, a petition for a writ of certiorari must be filed within 90 days of the entry of the judgment below. 28 U.S.C. Sec. 2101(c) (1976). This Court has held that, with respect to civil cases, the untimely filing of a petition for certiorari is considered to be a jurisdictional defect. See: Department of Banking of Nebraska v. Pink, 317 U.S. 264 (1942); Matton Steam-

boat Co. v. Murphy, 319 U.S. 412 (1943); Deal v. Cincinnati Board of Education, 402 U.S. 962 (1970).

The judgment of the court below in Fusco v. Perini North River Associates, 622 F. 2d 1111 (2d Cir. 1980) was entered on June 4, 1980. Petitioner Fusco filed neither a petition for rehearing, nor any other application for post judgment relief with the court below, which would toll the 90 day time limitation set forth in 28 U.S.C. Sec. 2101(c). See: Sup. Ct. R. 20.4; Department of Banking of Nebraska, 317 U.S. at 266. On October 17, 1980, Petitioner Fusco filed a petition for a writ of certiorari with this Court, docket number 80-651. Respondents respectfully submit that Fusco's failure

to file his petition until 135 days after the entry of the judgment below renders the petition for a writ of certiorari jurisdictionally defective.

Respondents are aware that a petition for rehearing of the Second Circuit's decision in Fusco, supra, was timely filed by Petitioner Bernard Sullivan. That petition for rehearing was denied by the Second Circuit Court of Appeals on August 19, 1980. Accordingly, Sullivan's petition for a writ of certiorari, docket number 80-639, filed on October 20, 1980, was timely. However, Respondents contend that the 90 day period within which Fusco could petition this Court for a writ of certiorari is not tolled by the filing of a petition for rehearing by Sullivan.

Supreme Court Rule 20.4 provides, in relevant part, that

> if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing or joined in the petition for rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on the rehearing.

Respondents contend that Petitioners Fusco and Sullivan are not parties in the same case, and therefore, the petition for a writ of certiorari filed by Fusco remains untimely, despite the timely petition for rehearing filed by Sullivan.

Claimants Fusco and Sullivan each sustained accidents while employed by Perini North River Associates on the

same construction project. Since these and other pending cases involved common questions of law and fact, the Benefits Review Board consolidated the cases for the purposes of these appeals. Sedmak v. Perini North River Associates, 9 BRBS 378, 380 (1978). (See Petitioner Fusco's Appendix F at A-39). Subsequently, by order dated February 15, 1979, the United States Court of Appeals for the Second Circuit granted a motion to consolidate the petitions for review filed by Ronald Fusco, Bernard Sullivan and the Director, Office of Workers' Compensation Programs, United States Department of Labor. (See Appendix A at A-1, A-2). However, this Court has held that a consolidation, "does not merge the suits into a single

cause, or change the rights of the parties, or make those who are parties in one suit parties in another." Johnson v. Manhattan Railroad Co., 289 U. S. 472 (1933) (emphasis added). Rather, consolidation is permitted as a matter of convenience and economy in judicial administration.

Similarly, in his treatise on federal practice, Professor Moore states that in a consolidated case, "[t]he actions retain their separate identity, and the parties and pleadings in one action do not automatically become parties and pleadings in the other action." 5A Moore's Federal Practice, Par. 42.02, at 42-22 (2nd ed. 1980).

In Cole v. Schenley Industries, Inc., 563 F. 2d 35 (2d Cir. 1977), the

Court of Appeals for the Second Circuit considered the effect of a consolidation on the jurisdictional basis of four actions brought in federal court. In that matter, four separate suits challenged the merger of two companies. The four actions were consolidated by the District Court Judge. Citing Johnson, supra, the Court of Appeals stated that "consolidation cannot effect a merger of the actions or the defenses of the separate parties. It does not change the rights of the parties in the separate suits." 563 F.2d at 38. The court then proceeded to consider the jurisdictional basis of each complaint separately. See also: Greenberg v. Giannini, 140 F. 2d 550 (2d Cir. 1944).

Respondents respectfully submit

that, although the petitions of Fusco and Sullivan have been consolidated in the court below, each action retains its separate identity. Therefore, Fusco and Sullivan are not parties to the same case, within the meaning of Rule 20.4 of the rules of this Court. Accordingly, the filing of a petition for rehearing by Sullivan does not toll the time requirements of Section 2101 (c) with respect to Petitioner Fusco and consequently his petition for a writ of certiorari is jurisdictionally defective and should be denied.

POINT II

THE DECISION BELOW IS CONSISTENT WITH THE INTERPRETATION OF SECTION 2(3) OF THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, MANDATED BY THIS COURT IN P. C. PFEIFFER CO. V. FORD.

The Supreme Court previously vacated the judgment of the Second Circuit in Fusco v. Perini North River Assoc., 601 F. 2d 659 (2nd Cir. 1979), and remanded the matter for further consideration in light of P. C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979). Perini North River Assoc. v. Fusco 444 U.S. 1028 (1980).

Upon remand, the Second Circuit concluded with regard to the "maritime employment" test of Sec. 2(3):

> ....[W]e read the opinion [of the Supreme Court in P. C. Pfeiffer Co. v. Ford, supra] as pre-

> cluding any application of the LHWCA, as amended in 1972, to any employee whose activities do not bear a significant relationship to navigation or to commerce on navigable waters.

622 F. 2d 1111, 1113 (1980). On this basis, the court below denied the petitions of Fusco and Sullivan, holding that:

> In the cases at bar the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters. They were engaged exclusively in constructing a sewage disposal plant.

622 F. 2d at 1113.

The decision below is entirely consistent with the opinion of this Court in P. C. Pfeiffer, supra. In that matter, this Court rejected a geographic interpretation of the phrase "maritime employ-

ment", stating that this analysis "is plainly inconsistent with the language and structure of the 1972 Act". 444 U.S. at 78. Rather, it was held that "maritime employment" embodies an occupational concept focusing upon the nature, not the location, of employment. 444 U.S. at 78, 83.

Petitioners have urged this Court to limit the occupational status test set forth in P. C. Pfeiffer to injuries occurring only upon the shoreside areas enumerated in amended Sec. 3(a) of the Act. They urge that construction workers injured upon pre-1972 navigable waters are covered under the amended Act solely by virtue of their geographical location, or by virtue of their alleged prior coverage under the 1927 Act.

There is considerable doubt whether Fusco and Sullivan were in fact injured on pre-1972 navigable waters (as they argue in their petitions) or on the substructure under construction itself. If the latter is the case, then any argument for coverage premised solely upon the location of injury over pre-1972 navigable waters must obviously fail.

The Administrative Law Judges and the Benefits Review Board found it unnecessary to distinguish between pre-1972 and post-1972 navigable waters. In its original decision, in which the court below adopted the now discredited "geographical interpretation" of "maritime employment", the court felt compelled to make findings of fact to the effect

that petitioners were injured upon pre-1972 navigable waters. 601 F. 2d 659, 663. However, in its decision upon remand, and after considering the mandate of this Court in P. C. Pfeiffer v. Ford, the Second Circuit found it unnecessary to make any distinction between navigable waters as defined before and after the 1972 Amendments to the Act. 622 F. 2d at 1113.

In fact, Fusco states in his petition that on January 8, 1975 while assisting a group of dockbuilders on the pier, he fell while descending a ladder from atop the grillage above the forms, to the bottom of the form. See: Fusco's Petition at 13-14. Certainly, Fusco's own statement shows that he was injured on the substructure, and not on pre-1972

navigable waters.

In Sullivan's case, the only relevant finding made by the trier of fact was that claimant was standing about 12 inches above the water at the time of accident (Fusco Appendix B at A-99). In testimony, however, it was established that Sullivan was injured on the substructure, above the water, while installing beams which ran from caisson to caisson. (Transcript of Administrative Law Judge hearing, January 19, 1977, at 10).

The evidence supports the conclusion that petitioners were not injured over pre-1972 navigable waters, as their accidents occurred on a structure permanently affixed to the land. Therefore, prior to 1972, petitioners would not have been entitled to benefits under the Act. Nacirema Operating Co. v.

Johnson, 396 U.S. 212 (1969).

In any event, there is no statutory foundation on which to conclude that the status test of "maritime employment" is to be applied only to those injuries involving construction workers on the shoreside situs. If the Court determines that a worker injured over pre-1972 navigable waters is eligible for benefits, solely by virtue of the situs of injury - and without an inquiry into the claimant's occupation - two disparate tests of eligibility result: one occupational test for shoreside employees and another geographical analysis for employees injured over 1927 navigable waters.

This geographical distinction, creating two "maritime employment" tests pursuant to Sec. 2(3), was clearly

renounced in Pfeiffer, in which it was determined that "[t]he use of the term 'maritime employment' in Sec. 2(3), therefore, provides no support for the proposition that the statutory definition of an employee imports a geographic limitation narrower than the one defined in Sec. 3(a)." 444 U.S. at 78.

Section 2(3) states in part, that "[w]hen used in this Act . . . the term employee means any person engaged in maritime employment . . . " 33 U.S.C. 902(3). (Emphasis supplied). This definition permits no license to distinguish among employees injured on any situs noted in Sec. 3(a). "To be eligible for compensation, a person must be an employee as defined by Sec. 2(3) who sustains injury on the situs defined by Sec. 3(a)."

Pfeiffer, 444 U.S. at 74.

As the Supreme Court stated in Pfeiffer, Congress intended to apply a simple, uniform standard of coverage. 444 U.S. at 83.

In addition, contrary to petitioners' assertions, coverage under the 1927 Act provides no basis for coverage under the Act as amended in 1972. By affirmatively describing the classes of workers contained in the Sec. 2(3) definition of "employee", Congress has indeed withdrawn coverage from those individuals, such as construction workers, who otherwise might have been covered under the 1927 Act solely by virtue of the situs of injury.

This Court in P. C. Pfeiffer, supra stated that:

> [t] he Act, . . . contains distinct situs and status requirements. The situs test of Sec. 3(a) allows recovery for an injury suffered on navigable waters or certain adjoining areas landward of the Jensen line. This test defines the broad geographic coverage of the Act. Section 2(3) restricts the scope of coverage by further requiring that the injured worker must have been engaged in "maritime employment". This section defines the Act's occupational requirements. The term "maritime employment" refers to the nature of a worker's activities.

444 U.S. at 78. (emphasis added).

Assuming, arguendo, that Petitioners Fusco and Sullivan would have been covered under the 1927 Act, they must now satisfy the "maritime employment" test of Sec. 2(3) - a prerequisite to coverage not previously demanded of the particular claimant. Northeast Marine Terminal Co. v. Caputo,

432 U.S. 249, 264 (1977) 1/

In Weyerhauser Co. v. Gilmore, 528 F. 2d 957 (9th Cir. 1975), cert. denied, 429 U.S. 868 (1976), the court termed the assertion that anyone covered under the Act prior to the 1972 Amendment must indeed be permitted to come within its protection subsequent to the Amendments, "an exercise in judicial legerdemain". 528 F. 2d at 960-1.

To the extent that construction workers were covered prior to 1972, such

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1/ Professor Larson, in his treatise on Workers' Compensation Law stated,

> . . . that the expansion of the Act took place solely in the enlargement of "situs" covered. The addition of the "status" test is not an expansion but a contraction.

4 Larson, Workmen's Compensation Law, Sec. 89.27 at 16-181 (1980).

coverage was due to the strict situs rule announced by this Court in Calbeck v. Travelers Insurance Company, 370 U.S. 114 (1962). Clearly, construction workers employed over pre-1972 navigable waters were never themselves considered to be in "maritime employment". In Pennsylvania Railroad Co. v. O'Rourke, 344 U.S. 334 (1952), this Court flatly stated that not all persons covered under the 1927 Act were engaged in "maritime employment".

> If, then, the accident occurs on navigable waters, the Act must apply if the injured longshoreman was there in furtherance of his employer's business, irrespective of whether he himself can be labeled 'maritime'.

344 U.S. at 341-342.

Of particular importance is the

collection of cases made by the Court which "deal with various types of construction and service workers, obviously not themselves engaged in traditional 'maritime employment', if one were to look solely to the particular type of job they were engaged for." 344 U.S. at 341. (emphasis added).

For petitioners to be covered solely by virtue of their alleged prior coverage under the 1927 Act, it would be necessary to define the "maritime employment" test of Sec. 2(3) geographically when used in reference to workers injured over pre-1972 navigable waters and occupationally when applied to workers injured upon the expanded post-1972 navigable waters. As stated previously at page 17 , supra, the Act and the

cases do not sanction the application of the two separate tests of "maritime employment" based upon situs of injury.

"Maritime employment" as used in Sec. 2(3) of the Act requires a single, uniform, occupational test, regardless of where the claimant is employed within the Sec. 3(a) situs. Caputo, supra, 432 U.S. 249, 272.

This Court stated in P. C. Pfeiffer, supra, "[w]e decline the invitation to construe 'maritime employment' so as to create two differing situs requirements in a single sentence." 444 U.S. at 79. To hold that any employment over 1927 navigable waters is a sufficient basis for coverage would be to read Sec. 2(3) out of the Act. Id., Weyerhauser Co. v. Gilmore, supra, 528 F. 2d at 961. Such legislative revision is most appropriately left to Congress.

POINT III

THE DECISION BELOW IS CONSISTENT WITH THE DECISIONS OF THE CIRCUIT COURTS WHICH HAVE CONSIDERED THE ISSUE OF "MARITIME EMPLOYMENT" UNDER SEC. 2(3) OF THE ACT.

By adopting an occupational status test, the Second Circuit determined that petitioners' work must "bear a significant relationship to navigation or to commerce on navigable waters" in order to be eligible for benefits under the Act. Fusco v. Perini North River Assoc., 622 F. 2d 1111, 1113. The standard employed by the court below is consistent with that adopted by every Circuit which has considered the issue of maritime employment under Sec. 2(3). See: Stockman v. John T. Clark and Son of Boston, 539 F. 2d 264, 271, 276

(1st Cir. 1976), cert. denied, 433 U.S. 908 (1977); Sea-Land Serv. v. Dir., Office of Wkrs.' Comp., 540 F. 2d 629 (3rd Cir. 1976); Conti v. Norfolk & W. Ry., 566 F. 2d 890, 895 (4th Cir. 1977); I.T.O. Corp. of Baltimore v. Benefits Review Board, 529 F. 2d 1080 (4th Cir. 1975), modified en banc on other grounds, 542 F. 2d 903 (4th Cir. 1976), vacated and remanded sub nom., Adkins v. I.T.O. Corp. of Baltimore, 433 U.S. 904 (1977), rev'd on remand, 563 F. 2d 646 (1977); Thibodoux v. Atlantic Richfield Co., 580 F. 2d 841 (5th Cir. 1978), cert. denied 442 U.S. 909 (1979); Weyerhauser Co. v. Gilmore, 528 F. 2d 957, 959-60 (9th Cir. 1976), cert. denied, 429 U.S. 868 (1976).

Petitioners cite Odom Constr. Co.,

Inc. v. U. S. Dept. of Labor, 622 F. 2d 110 (5th Cir. 1980) as an example of a conflict among the circuits.

Although normally a construction worker, on the day of injury, claimant was engaged in a two day job that required moving four large concrete blocks that had been located on the bank of a navigable canal but had sunk into the water because of erosion. The blocks were used solely as a place to tie off or moor barges that were waiting to be moved to loading facilities, and loaded barges awaiting tow boats. 622 F. 2d at 112.

The Fifth Circuit concluded that this activity on the day in question was maritime work. 622 F. 2d at 112. Citing the exact standard adopted in

Weyerhauser Co. v. Gilmore, supra, the court held that the job being done clearly had "a realistically significant relationship to 'traditional maritime activity involving navigation and commerce on navigable waters' . . .,". Odom Constr. Co., 622 F. 2d at 113. The court below likewise cited Weyerhauser, supra, with approval. Fusco, 622 F. 2d at 1113. Obviously the work involved in Odom, supra, facilitated navigation and commerce on navigable waters.

Petitioner's reliance on Brown and Root, Inc. v. Joyner, 607 F. 2d 1087 (4th Cir. 1979), cert. denied, _____ U.S. _____, 100 S. Ct. 2960 (1980), in support of a "conflict among the circuits" is equally misplaced. In that matter, the Fourth Circuit was careful

to note "that employment held to be traditionally maritime under the former Act has not been stripped of its maritime character by the 1972 amendments." 607 F. 2d at 1090. The claimant's activities in Brown and Root, were the construction of a dry dock, which, the court emphasized, is peculiarly a maritime facility. 607 F. 2d at 1089. Claimants' activities in the instant case involved the construction of a sewage treatment plant, clearly without relationship to navigation and commerce over navigable waters.

P. C. Pfeiffer, supra, mandates an inquiry into the factual circumstances surrounding the individual employee's work activity. 444 U.S. at 78. Since the Circuits have adopted a legal standard

requiring a nexus between a claimant's work and maritime activities involving navigation and commerce on navigable waters, it is clear that the alleged "conflicts" with the decision below refer simply to differing results dependent upon the particular factual circumstances of each case. It is respectfully submitted that the decision from which review is sought herein turns solely upon questions of fact, and is thus not a proper subject for review by this Court. United States v. Johnston, 268 U. S. 220, 227 (1925).

POINT IV

THE COURT BELOW ANALYZED THE WORK ACTIVITIES OF PETITIONERS IN ACCORDANCE WITH THE MANDATE OF THIS COURT AND CORRECTLY CONCLUDED THAT THEIR ACTIVITIES DO NOT BEAR A SIGNIFICANT RELATIONSHIP TO NAVIGATION OR TO COMMERCE ON NAVIGABLE WATERS.

Petitioner Fusco was described by Administrative Law Judge Lesser as a construction laborer who assisted in the construction of a substructure of a sewage disposal plant, performing such tasks as fetching materials from barges or from the shore, assisting in the driving of caissons into the river bed, pouring concrete into the caissons, fabricating wood forms for the pouring of concrete beams across the caissons and helping to construct platforms across the beams. (Petitioners' Appendix G at A-89).

Administrative Law Judge Feldman found that Sullivan was employed as a wire lather whose principal duties were the steel reinforcement of concrete. Sullivan was directly involved in building and filling caissons with steel reinforcing rods and concrete; and reinforcing horizontal beams hanging over the water from caisson to caisson. (Petitioners' Appendix H at A-99). Sullivan's argument, that he was engaged in longshoring operations because he occasionally unloaded construction material from barges at the job site, was categorically rejected by the Administrative Law Judge (Petitioners' Appendix H at A-101-102); the Benefits Review Board (Petitioners' Appendix F at A-45); and the Second Circuit (Petitioners' Appen-

dix B at A-7).

While necessarily conceding that they are construction workers by occupation, petitioners argue at length that they satisfy the "maritime employment" test because a sewage disposal plant was to be erected upon the concrete substructure they were building. They urge that the sewage disposal plant - which Perini North River Associates has not contracted to build, and which is, in fact, not yet built - would ultimately alleviate pollution in the Hudson River, thereby providing for the protection of fish, shellfish and wildlife and providing for recreation in and on the water. See, Fusco petition at 27; Sullivan petition at 32.

When it considered this argument,

the court below stated that "[i]t is not significant that the plant was being constructed so that sewage would not cause pollution of navigable waters". 622 F. 2d at 1113.

Clearly, navigation and commerce will continue on the Hudson River regardless of whether pollution is reduced. Longshoremen and other workers enumerated in Sec. 2(3) of the Act will continue to perform their usual duties with or without a sewage treatment facility. Certainly, any claimed effect upon seamen or fishermen - not covered occupations - or fish, shellfish and wildlife, has no relevance to questions of coverage under the Act. The record does not support the proposition that reducing pollution aids navigation.

Further, the relationship between the construction of a substructure and the operation at a sewage treatment facility is untenable. Assuming, arguendo, that there were some maritime purpose attributable to a sewage treatment plant yet to be built, agreements to provide mere facilities for navigation are not maritime. Massman Construction Co. v. Bassett, 30 F. Supp. 813,815 (E.D. Miss. 1940), rev'd on other grounds, 120 F. 2d 230 (8th Cir. 1941), cert. denied, 314 U.S. 648 (1941). Also, it is simply incorrect to state that a sewage treatment facility could eliminate pollution in the Hudson River only by being erected upon navigable water. (See Fusco petition at 28). It is contemplated that the sewage

treatment facility will dispose of raw sewage from the west side of the City of New York, and not treat the waters of the Hudson River. (Transcript of Administrative Law Judge hearing, December 15, 1976, at 122-123). There is no evidence in the record showing that raw sewage must be treated over navigable waters.

The court below applied the occupational status test described in P. C. Pfeiffer, 444 U.S. at 82, and scrutinized the work activities of each petitioner. The court concluded that "the claimants' activities had nothing significant to do with navigation or with commerce on navigable waters." 622 F. 2d 1111, 1113. Manifestly, the Second Circuit was correct when it stated that:

> The only sense in which the claimants' activities were maritime was in the sense of their locus. To base a decision upon the locus of work is to found it upon a geographic concept - a foundation precluded by the reasoning in the Ford case.

622 F. 2d 1111, 1113.

CONCLUSION

FOR THESE REASONS, THE PETITIONS FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

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November 17, 1980

APPENDIX

Appendix A

A-1

Order of the United States Court of Appeals for the Second Circuit granting the motion to consolidate the appeals of Ronald Fusco, Bernard Sullivan and the Director, Office of Workers' Compensation Programs, Department of Labor

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of February, one thousand nine hundred and seventy-nine.

In the Matter of RONALD FUSCO,
Petitioner

v.

UNITED STATES DEPARTMENT OF LABOR, (Benefits Review Board, PERINI NORTH RIVER ASSOCIATES and HARTFORD ACCIDENT & INDEMNITY COMPANY,
Respondents.

It is hereby ordered that the motion made herein by counsel for the petitioner dated February 6, 1979 for leave to

consolidate the petitions for review in Docket Nos. 79-4006, 79-4015 and 79-4016
be and it hereby is granted.

/s/ Murray I. Gurfein

Circuit Judge

sec 0

sec 36